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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

WILLIAM DUANE ELLEDGE,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

Whether the outcome determinative test is an appropriate measure of prejudice in the analysis of a claim of the denial of the Sixth Amendment right to effective assistance of counsel, where that claim is based upon counsel's substantial failure to investigate compelling mitigating circumstances due to the trial court's failure to allow sufficient time for preparation?

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AUTHORITIES CITED

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States. It further involves Section 921.141, Florida Statutes (1977), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence." Because of its length, the statute is set out in its entirety at Appendix C.

STATEMENT OF THE CASE

Petitioner was charged by indictment with the rape and first degree murder of Margaret Strack. On March 17, 1975, following denial of his motions to suppress custodial statements, petitioner pled guilty to both offenses and was so adjudged. A sentencing trial was held, at the conclusion of which the jury recommended death. The sentencing judge sentenced petitioner to death for first degree murder and fifty years imprisonment for rape.

Thereafter, petitioner appealed his conviction and sentence to the Supreme Court of Florida, which affirmed the conviction but reversed the death sentence and remanded for a new sentencing. Elledge v. State, 346 So.2d 998 (Fla. 1977).

Immediately prior to commencement of the resentencing proceeding, counsel moved for a continuance. The motion was denied, the resentencing proceeded and petitioner was again sentenced to death. The Florida Supreme Court affirmed the sentence. Elledge v. State, 408 So.2d 1021 (Fla. 1982). After denial of rehearing, a petition for writ of certiorari was filed with this Court. That petition was denied, Elledge v. Florida, ___ U.S.___, 103 S. Ct. 316 (1982), and rehearing was denied on January 10, 1983, ___U.S.___, 51 U.S.L.W. 3510 (1983).

On January 25, 1983, executive clemency proceedings were held before the Governor and Cabinet. On February 15, 1983 the Governor signed a death warrant ordering petitioner's execution between noon March 11, 1983 and noon March 18, 1983. Petitioner's execution was scheduled for 7:00 a.m., March 15, 1983.

Petitioner then commenced the post-conviction proceedings which have led to the petition filed with the Court today. Petitioner filed a motion to vacate judgment and death sentence

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Petitioner prays that the writ of certiorari issue to review the judgment of the Florida Supreme Court filed March 10, 1983, upon which rehearing was denied on June 22, 1983.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida which is the subject of this petition is reported as Elledge v. Graham, 432 So.2d 35 (Fla. 1983) and is set out as Appendix A to this petition. Rehearing with respect to this opinion was denied, and the order denying rehearing is attached as Appendix B to this petition.

JURISDICTION

The judgment of the Supreme Court of Florida was filed on March 10, 1983, and petitioner's timely motion for rehearing was denied on June 22, 1983. The Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States, granted petitioner an extension of time until September 20, 1983, to file this petition for writ of certiorari. Jurisdiction of this Court is invoked pursuant to 28 U.S.C §1257(3), petitioner having asserted below and asserting herein the deprivation of rights secured to him by the Constitution of the United States.

application for stay of execution. An evidentiary hearing was held on March 9, 1983 with respect to petitioner's claim that his counsel during resentencing had rendered ineffective assistance. The trial court issued an order on March 10, 1983 denying the motion to vacate judgment and sentence and denying the application for stay of execution.

Following denial of his appeal to the Florida Supreme Court, Elledge v. Graham, 433 So.2d 35 (Fla. 1983), petitioner timely filed in this Court for certiorari review.

STATEMENT OF THE FACTS

This case involves the death of Margaret Strack in petitioner's apartment after an alleged rape on August 26, 1974. Ms. Strack first met Mr. Elledge in a bar in Hollywood, Florida. After talking and drinking for a while with Mr. Elledge, Ms. Strack voluntarily accompanied him to his nearby apartment, where they continued drinking and began to smoke marijuana. Ms. Strack then undressed and initiated sexual activity with Mr. Elledge. When Mr. Elledge began to respond to Ms. Strack's overtures, however, Ms. Strack refused to continue. At that moment, Mr. Elledge "freaked out" and while in such a state choked Ms. Strack, forcing her to engage in intercourse. (Transcript of Guilty Pleas Proceedings, March 17, 1975, at 13) While Mr. Elledge was still in this mental and emotional state, Ms. Strack again resisted him, and he "just kind of blacked out, and lost all control of what [he] was doing" and choked Ms. Strack until he realized, some time later, that she was dead. (Ibid.)

At the hearing on his post-conviction motion to vacate, Mr. Elledge claimed that he was denied the effective assistance of counsel at resentencing because of counsel's substantial inability to prepare for the proceeding. Mr. Elledge claimed that counsel's inability was caused by the court's denial of a continuance; counsel thus failed to prepare for trial through no strategic choice but rather through the interference of the state. The evidence adduced in support of this claim overwhelmingly demonstrated that as a result of this court-imposed lack of preparation, petitioner, not unlike the petitioners in

Powell v. Alabama, 287 U.S. 45, 69 (1932), was deprived of the guiding hand of counsel at every step in the proceedings against him."

Two witnesses testified at the hearing on effective assistance. Robert McCain, petitioner's counsel for the trial and resentencing, discussed his theories of defense and his conversations with Mr. Elledge. His theory of defense prior to Mr. Elledge's guilty plea was essentially two-fold. The first was a plea of not guilty by reason of insanity, but when two court-appointed psychiatrists returned a report finding Mr. Elledge competent that defense was abandoned. The second defense was suppression of the custodial statements made by petitioner. When this motion was denied, the fall back defense was to enter a plea of guilty and "go to the mercy of the court." After the denial of the motion to suppress, he advised Mr. Elledge to plead guilty and the pleas were entered the same day.

Regarding the penalty trial, in 1977, Mr. McCain testified that he was definitely not prepared and that there were additional specific matters that he needed to investigate in order to properly represent Mr. Elledge. He testified that these matters related to petitioner's mental condition at the time of the offense, including the the fact that Elledge had been placed on "mind drugs" at the prison. Counsel testified that without a continuance, he was left with virtually no defense except for his client, in essence, saying what he said in the prior trial. Counsel had wanted to investigate the fact that Mr. Elledge was on Mellaril and an epilepsy drug while in prison and wanted to bring in several witnesses concerning Elledge's background. Mr. McCain said that he thought Elledge was "crazy" and thought that if he were able to investigate the psychiatric defense it would "bear fruit".

Mr. Elledge also testified at the hearing as to his conversations with Mr. McCain about the case. He consistently told Mr. McCain that at the time of the offense, he was "not in his right mind", "in a complete daze." He said that Mr. McCain advised him to plead guilty and "throw himself on the mercy of the court" after the competency issue had been decided and the

suppression had been denied. Mr. McCain did not discuss with him the elements of the offense or possible defenses prior to entry of the plea.

Prior to the 1977 sentencing trial, Mr. Elledge had been in the jail a week or two before he saw Mr. McCain. He saw Mr. McCain, only a few days before trial, as a result of Mr. Elledge's telephoning Mr. McCain, who had not known that Elledge had been returned to the Broward jail. He told Mr. McCain about having received drugs and psychiatric treatment in prison. Mr. McCain told him he was going to move for a continuance. The continuance was denied, and thus the only preparation was reading over his testimony of the first trial.

In addition to the testimony below, Mr. Elledge proffered certain testimony and records. A proffer was made of the report of Dr. Dorothy Otnow Lewis, M.D. as to her extensive evaluation of Mr. Elledge. Also proffered was the testimony of certain members of Elledge's family. The purpose of the proffer was to establish the evidence that would have been available had counsel been able to conduct an investigation.

The trial court reserved ruling on the motion, and then on March 10, 1983 issued his ruling denying the motion.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER "OUTCOME-DETERMINATIVE" IS THE PROPER STANDARD FOR ANALYZING PREJUDICE RESULTING FROM THE DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN SUCH DENIAL IS CAUSED, AT LEAST IN PART, BY THE COURT'S REFUSAL TO ALLOW COUNSEL SUFFICIENT TIME TO INVESTIGATE COMPELLING EVIDENCE IN MITIGATION.

This petition presents the question of the proper standard for determining prejudice in the context of a capital sentencing proceeding where ineffective assistance of counsel results from judicial interference with the attorney-client relationship. This Court presently has before it the issue of the constitutional standards for judging claims of the denial of effective assistance of counsel when the state is blameless for the resulting ineffectiveness. See Strickland v. Washington, ___U.S.___, 51 U.S.L.W. 3865 (June 6, 1983) (No. 82-1554) [granting certiorari in Washington v. Strickland, 693 F.2d 1243

(5th Cir. 1982) (Unit B) (en banc)], and United States v. Cronic, ___U.S.___, 51 U.S.L.W. 3398 (February 22, 1983) (No. 82-6609) [granting certiorari in United States v. Cronic, 675 F.2d 1126 (10th Cir. 1982)]. Because it provides an opportunity to resolve important, recurring, questions concerning state-induced ineffective assistance of counsel which are not presented by Washington and Cronic, Mr. Elledge's ineffective assistance of counsel claim is especially ripe for review by this Court. After showing why his case is a necessary companion to Washington and Cronic, Mr. Elledge will discuss the historical facts underlying his constitutional claim to demonstrate the appropriateness of deciding the issue he presents on the record of his case.

A. Issues Requiring Resolution by this Court

Two aspects of this case merit review by this Court. First, here it was the court's action, the circumstances surrounding its appointment of counsel and then its denial of a continuance needed to develop crucial mitigating evidence, that caused counsel to be ineffective. This case thus presents the question of the proper standard of ineffective assistance and prejudice required when the ineffectiveness resulted from judicial interference with the attorney-client relationship. Secondly, Mr. Elledge's case squarely raises the appropriateness of an "outcome-determinative" test of prejudice in ineffective assistance cases. The Florida courts, in rejecting Mr. Elledge's claim, relied upon the outcome determinative standard for evaluating prejudice that the Florida Supreme Court established in Knight v. State, 394 So.2d 997, 1001 (Fla. 1981). Elledge v. Graham, supra, 432 So.2d at 37. The United States Court of Appeals for the Fifth Circuit in Washington v. Strickland, 693 F. 2d 1243 (5th Cir. 1983) (en banc) rejected the Knight test applied in Florida. There is hence a direct conflict between the standard applied by the federal court, and presently under review by this Court, and the standard followed to affirm Mr. Elledge's death sentence.

Mr. Elledge was denied the effective assistance of counsel at his resentencing due to his counsel's total inability to and failure to investigate Mr. Elledge's one plausible line of

defense. The facts,as developed during the [illegible] hearing and discussed in more detail below, demonstrate that (1) counsel made no investigation regarding the one plausible defense - Mr. Elledge's mental condition; (2) this lack of investigation was caused by the lack of time allowed to prepare for the resentencing; it did not result from a strategic or tactical decision by counsel; (3) this lack of investigation was extremely prejudicial; had such investigation and preparation been done, significant and compelling evidence could have been presented on Mr. Elledge's behalf.

It is the second element, the reason for the ineffective representation, which raises important sixth amendment issues and which makes this an excellent companion to the two ineffective assistance cases presently pending in this Court.Unlike counsel in Washington and Cronic, counsel in Mr. Elledge's case was prevented by judicial action from effectively representing him. Mr. Elledge's trial counsel was unable to prepare because the court appointed him at the eleventh hour and then denied his motion for a continuance.[1]

Specific cases of ineffective assistance and prejudice fall along a continuum based, in part, upon the degree to which the state is responsible for the resulting deficiencies of defense counsel and calibrated to the degree of prejudice which must be shown before a new sentencing is mandated. On one pole are cases where a state procedure places a disability upon counsel that pervades his entire conduct of the defense. Cases at this extreme of the spectrum include Geders v. United States, 425 U.S. 80 (1976) (defense counsel not permitted to confer with client during overnight mid-trial recess); Herring v. New York, 422 U.S. 853 (1975) (statute barred final summation by defense counsel);

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[1] Mr. Elledge readily acknowledges that in general a court's disposition of a motion for continuance, though it must comport with requirements of due process, Ungar v. Sarafite, 376 U.S. 575, 589 (1964), is a matter within the sound discretion of the trial court. But the question now presented is a violation of the sixth amendment right to counsel, and the standards are significantly stricter: the inquiry now must focus on the quality of representation actually received by Mr. Elledge, and here that inquiry is inseparable from the question of the propriety of the continuance. The issue is the proper inter-relationship between the court's power over continuances and the effect the exercise of such power may have upon a criminal defendant's right to effective representation.

conflicting interests); Powell v. Alabama, 287 U.S. 45 (1932) (counsel denied adequate opportunity to confer with defendants and to prepare for trial).

In these cases, defense counsel was appointed but prevented by agents of the state from discharging functions vital to effective representation of the clients. The state-created procedures in these cases were what impaired the accused's enjoyment of the sixth amendment guarantee "by disabling his counsel from fully assisting and representing him. Because these impediments constitute direct state interference with the exercise of a fundamental right, and because they are susceptible to easy correction by prophylactic rules, a categorical approach is appropriate." United States v. Decoster, 624 F.2d 196, 201 (D.C. Cir. 1976) (en banc). Reversal in such cases is required, without need of showing prejudice, for the reasons discussed in Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978).

At the opposite pole of the ineffectiveness spectrum are claims that counsel committed certain discrete errors of omission and commission that reasonably effective counsel would not have committed; these errors resulted from counsel's own shortcomings rather than from actions by the State. This type of ineffective representation may just as seriously jeopardize the rights of a criminal defendant as the ineffectiveness discussed above, but they are less offensive to our sense of fairness because here the state is not the cause of the breakdown of the attorney-client relationship. In part for this reason, courts decline to find per se prejudice in this type of case. The Court's recent grants of certiorari in Washington and Cronic have provided an opportunity for the Court to address the critical issue of the degree of prejudice required to be shown in connection with a claim of ineffective assistance when counsel is alleged to have committed discrete errors.

The lower courts have divided into three groups concerning the measure of prejudice in this category of ineffective assistance of counsel claims. The tenth circuit in Cronic held that where the claim involves lack of preparation and experi-

since, prejudice cannot be wholly weighed. [illegible] The fifth circuit, by contrast, held in Washington that a petitioner asserting ineffective assistance must show that that his representation resulted in "actual and substantial disadvantage to the cause of his defense." 693 F.2d at 1128. The most extreme position is that developed by the District of Columbia Circuit in United States v. Decoster, 624 F.2d at 208, 211-12, adopted by the Florida Supreme Court in Knight v. State, 394 So.2d 997, 1001 (Fla 1981) and applied by the Florida Supreme Court in this case: that a defendant suffering inadequate counsel must show, to receive a new trial or sentencing that adequate counsel would change the result on retrial.

Even assuming that the validity of the outcome determinative test is squarely before this Court in Washington, Mr. Elledge's case presents a dimension of the prejudice issue not raised by Washington or Cronic. This case presents the issue of whether the outcome determinative test is too stringent a standard of prejudice for ineffectiveness caused, in part, by governmental interference with the right to counsel. Thus, this case falls somewhere between the two polar extremes discussed above. The governmental interference arguably was not so severe that a new trial should be granted automatically. Yet it was sufficiently severe to preclude a conclusion that defense counsel was unhampered in his conduct of Mr. Elledge's case. The requisite showing of prejudice should be less where the denial of effective assistance of counsel results from interference by the state with that right. Regardless of the level of state involvement, however, Florida appears determined to apply its outcome determinative test of prejudice. This is an issue requiring resolution by this Court.

B. Petitioner's Claim of Ineffective Assistance of Counsel

Mr. Elledge's trial attorney testified below that he had only a few days (3 or 4) in which to prepare for the resentencing trial and that this was wholly insufficient for proper preparation, consultation and investigation. This lack of time arose from the lawyer not knowing that the scheduled trial date of August 2, 1977 was firm, not knowing that the Florida Supreme